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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 6

D. W. McEACHERN, ADMINISTRATOR OF THE ESTATE OF S. C. McEACHERN, DECEASED,

Petitioner,

vs.

J. T. ROSE, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF GEORGIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF AMICUS CURIÆ.

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Amicus Curiæ.

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BRIEF OF AMICUS CURIÆ.

Comes now, Robert Ash, as *Amicus Curiæ,* and presents this brief directed to the decisions of this Court on the question of equity in the interpretation of taxing statutes.

The brief is submitted because it appears to the writer that the decisions of this Court with reference to the nature of a taxpayers right of action to recover overpayments of taxes are conflicting, and that the Court's tendency at times to

analogize the action to an action for money had and received, equitable in nature, is most dangerous to the orderly administration of the Federal tax laws. A brief review of the authorities will make it clear that if any such principle has been announced by this Court in any case, a contrary principle has been followed in other cases and should be followed in all cases.

Whatever may be the origin of the action to recover taxes overpaid and whatever may be the common law restriction upon an action for money had and received, it is clear that the present suit is an action to recover amounts, the refund of which is expressly commanded by statute, and that it is only necessary, as in any other legal action to enforce a statutory right, to show that the statute requires the payment of money—not to show that in equity and good conscience plaintiff is entitled to the money. It may be that a common law right would subsist if Congress should take away the statutory right, but so long as the statutory right expressly given by Congress remains, equity is not a matter of importance.

This Court in *Bull* v. *United States,* 295 U. S. 247, 15 A. F. T. R. 1069, truly expressed the nature of the action to recover taxes overpaid. It said that the action is essentially one by the Government to test the correctness of the summary collection which for reasons of public policy it must be permitted to make before its legal right to the money is tested. It says that the taxpayer in such a suit is not really a plaintiff, but that he is actually a defendant and as such can plead recoupment. This holding was essential to the result reached in the *Bull* case. If the taxpayer is a defendant in such a suit, where he is clearly entitled to rely upon all his legal defenses, by what magic could he be converted in the present suit into a plaintiff in an action *ex aequo et bono?*

In *Jefferson Electric Company* v. *United States,* 291 U. S. 386, 13 A. F. T. R. 866, this Court upheld the right of

Congress to restrict recovery in cases where the tax had been collected from another. In sustaining the Congressional restrictions, the Court relied upon the fact that the statute prevented the taxpayer from recovering only when in justice and equity he was not entitled to the recovery. The Court clearly admitted, however, that before the Congressional restriction, recovery would have been granted in the suit.[1] If an action to recover taxes overpaid were available only when in justice and equity the taxpayer was entitled to recover, no Congressional restriction would be required to prevent recovery where *ex aequo et bono* taxpayer is not entitled to recover.

The case of *New York & Albany Lighterage Co.* v. *Bowers*, 273 U. S. 346, 6 A. F. T. R. 6541 is alone sufficient to show that an action on income taxes is an action to enforce a statutory right and is not equitable in nature. In that case, even before Section 607 of the 1928 Act or any similar provision was passed, this Court held that a suit against the Collector, identical with the present suit, would lie to recover amounts collected after the statute of limitations had run, where there was no other reason for recovery than that

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[1] "If the tax was erroneous and illegal, as is alleged, it must be conceded that, under the system then in force, there accrued to the taxpayer when he paid the tax a right to have it refunded without any showing as to whether he bore the burden of the tax or shifted it to the purchasers. And it must be conceded also that section 424 applies to rights accrued theretofore and still subsisting, but not sued on prior to April 30, 1928, and subjects them to the restriction that the taxpayer (a) must show that he alone has borne the burden of the tax, or (b) if he has shifted the burden to the purchasers, must give a bond promptly to use the refunded sum in reimbursing them. But it cannot be conceded that in imposing this restriction the section strikes down prior rights, or does more than to require that it be shown or made certain that the money when refunded will go to the one who has borne the burden of the illegal tax, and therefore is entitled in justice and good conscience to such relief. This plainly is but another way of providing that the money shall go to the one who has been the actual sufferer and therefore is the real party in interest." *United States* v. *Jefferson Elec. Mfg. Co.*, 291 U. S. 401-402.

the statute had run when the amounts were collected. If the suit to recover these amounts is limited by the usual limitations upon an action for money had and received, how could it possibly be availed of to recover in such a case? The English case of *Moses* v. *McFerlan,* 2 Burroughs, 1005, in which the opinion was written by Lord Mansfield, expressly says that that action will not lie to recover back a "payment of a debt barred by the statute of limitations."[2]

The opinion of this Court in *Stone* v. *White,* 301 U. S. 532, entirely ignores the inconsistency between its holding there and its decisions in the *New York & Albany Lighterage* case and the *Bull* case and adopts without qualification the view that the action is wholly equitable in nature, saying:

> "Its use to recover upon rights equitable in nature to avoid unjust enrichment by the defendant at the expense of the plaintiff, and its control in every case by equitable principles, established by Lord Mansfield in Moses *v.* MacFerlan, 2 Burr. 1005 (K. B. 1750), have long been recognized in this Court. * * * It is an appropriate remedy for the recovery of taxes erroneously collected, Elliott *v.* Swartwout, 10 Pet. 137, 156; Cary

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[2] "If the defendant be under an obligation from the ties of natural justice to refund, the law imposes a debt and gives an action founded on the equity of plaintiff's case, as it were, upon a contract quasi ex contractu, as the Roman law expresses it. This kind of equitable action to recover back money which ought not in justice to have been paid is very beneficial and therefore much encouraged. It lies only for money which ex aequo et bono the defendant ought to refund. It does not lie for money paid by plaintiff which is claimed of him as payable on a point of honor or honesty although it could not have been recovered from him through any course of law, *as in the payment of a debt barred by the statute of limitations,* or contracted during infancy, or to the extent of principal and legal interest upon a usurious contract, or for money lost at play, because in all these cases the defendant may defend with a safe conscience, though by positive law he is barred from recovery. In other words, the gist of this kind of action is that the defendant, under the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money." *Moses* v. *McFerlan,* 2 Burroughs, 1005. (Italics supplied.)

> *v.* Curtis, 3 How. 236, 246-250. The statutes authorizing tax refunds and suits for their recovery are predicated upon the same equitable principles that underlie an action in assumpsit for money had and received. United States *v.* Jefferson Electric Mfg. Co., 291 U. S. 386, 402. Since, in this type of action, the plaintiff must recover by virtue of a right measured by equitable standards, it follows that it is open to the defendant to show any state of facts which, according to those standards, would deny the right."

And the very first case cited by the Court is the English case of *Moses* v. *McFerlan,* above referred to[3] which is directly inconsistent with the heretofore unquestioned holding of this Court in the case of *New York & Albany Lighterage Co.*

It is respectfully submitted that when consideration is given to all the pronouncements of this Court on the subject of the nature of an action to recover taxes overpaid, and to the cases where the action is admittedly available to recover money which was owed by the taxpayer and which he is not *ex aequo et bono* entitled to have refunded, as in cases where the sole ground of recovery is that the tax was paid after the statute of limitations had run, this Court will not adhere to any view that an action for the recovery of taxes is an action equitable in nature dependent upon a showing that the Government has money to which, in justice and equity, plaintiff is entitled. On the contrary this Court must hold that the action is legal in nature and dependent only upon a showing that the taxes sued for have been overpaid.

That does not mean that an action to recover taxes overpaid is not, like all other legal actions, subject to certain

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[3] This case is also cited and quoted from by the Court below in the present case in support of its holding that the action is one for money had and received. (R. 61.)

equitable defenses, but it does mean that an action to recover back taxes is subject only to such defenses as would at the time the taxes were collected have permitted the Government to prevail in an action against the taxpayer. If the taxpayer has acted in such a way in some other taxable period as to deprive himself of the right to insist that his taxes for the taxable period in question be computed on what would under the statute alone be the correct basis—as where he has misrepresented a fact in an earlier year to the detriment of the Government and is in the later year held bound by that misrepresentation—he might be denied a refund to which, under the strict provisions of the statute alone, he would be entitled. But recovery would be denied, not upon the ground that the action to recover taxes is equitable or that a taxpayer is not definitely entitled to recover an admitted overpayment of taxes without regard to equities, but upon the ground that, under the facts which he has a right to present, no *overpayment* is shown to have occurred.

A holding that, where there has occurred an admitted overpayment of taxes which the Government could not legally have collected, such overpayment may not be recovered back because of some theory of inequity, would lead to most deplorable results. It would be most unfortunate if an officer, clothed with the vast power of summary action which rests with the Commissioner of Internal Revenue, could, by collection of amounts not due or barred by the statute of limitations, place himself in a better position to *keep* such money than he would have been in to *collect* it, had he been compelled to sue. Such a holding would invite lawlessness on the part of officials.

To permit the Government under such circumstances to retain illegal collections would necessitate the wide spread use of injunctions against the collection of taxes. The tax-

payer, in order to secure the injunction, could show facts which, after the tax is collected, might provide for the Government in a suit for refund the defense that the taxpayer *ex aequo et bono* is not entitled to recover. It is not difficult to picture the costly confusion into which the tax collecting agencies of the Government would be thrown by this extensive use of the injunction. Nevertheless, it is even more difficult to conceive of this Court's refusing an injunction where a real danger existed that an illegal tax once collected might successfully be withheld.

It is believed that this Court can search in vain through the revenue statutes for any suggestion that Congress has ever contemplated any such holding except under certain special circumstances expressly provided for by Congress.[4] Congress has generally shown a very wise desire to have taxpayers feel that they can make prompt payment of any taxes claimed from them, or which upon their own computation they feel they may owe, with the full assurance that if the taxes have been overpaid, that is, if the amounts paid are not such as the Commissioner could have legally collected for the year for which paid, the amounts so overpaid will be refunded or credited against unbarred liabilities which are collectible against the taxpayer. Congress has been careful to see to it that a taxpayer generally is not discriminated against in any way because he may actually have paid over his money or because of the manner in which the overpayment occurred.

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[4] Section 611 of the Revenue Act of 1928 (*Graham* v. *Goodcell*, 282 U. S. 409); Section 424 of the Revenue Act of 1928 (*Jefferson Electric Company* v. *United States*, 291 U. S. 386); Title VII of the Revenue Act of 1936 (*Anniston Manufacturing Company* v. *Davis*, 301 U. S. —). In the opinion of the writer it is unfortunate that Congress has seen fit in these few exceptional cases to depart from the general rule that a taxpayer is not prejudiced in any way by having paid a tax alleged to be due. It would be unfortunate in the extreme to have the Court hold that persons out of these special classes should be prejudiced by payment.

Sections 607 and 609 of the Revenue Act of 1928[5] require absolutely that amounts collected by *payment or credit* after the statute has run *shall constitute an overpayment* and expressly direct that *"it shall be refunded"*, provided only that a claim for refund is filed within time. Congress had already provided in 1924 that suit for refund could be maintained to recover a tax overpaid, although the payment was not made under protest. Congress has thus attempted in every way to see that a taxpayer is not deprived of the benefit even of the statute of limitations because the Government may wrongfully collect or he may ignorantly pay a barred tax, without any regard whatever to whether *ex aequo et bono* the tax was owed. Certainly there is no reason for this Court sanctioning any departure from the sound policy laid down by Congress even if it properly had authority to do so.

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[5] Section 607 of the Revenue Act of 1928 expressly provides that any tax paid after the statute of limitations has run constitutes an overpayment, and says that "it shall be refunded", provided only that a claim is filed within time. Section 609(a) of the Revenue Act of 1928 provides that if the Commissioner credits any amount against a barred liability, such credit shall be deemed an overpayment under Section 607. These are positive provisions of law expressly directing refunds not only of amounts paid by or collected from the taxpayer on assessments barred by the statute of limitations, but going further and expressly commanding by statute that there be refunded to taxpayer any amounts of any overpayments made by the Taxpayer which the Commissioner has credited against a barred liability. Certainly, the Courts should not require or permit the doing of what Congress has expressly prohibited.

Section 322 of the Revenue Act of 1928 provides that where a taxpayer has paid more than he owes for any year, the amount shall be credited against other taxes due by the taxpayer, and the balance "shall be refunded immediately to the taxpayer." When this is read in connection with Sections 607 and 609(a), it is clear that if the only outstanding liability is barred by the statute of limitations, refund is expressly commanded by statute.

And certainly it would be anomalous to defeat the very express commands of these statutes by holding that refunds cannot be secured if other amounts of tax are outstanding and barred, because under such circumstances the defendant does not have money to which *ex aequo et bono* plaintiff is entitled.

The Committee on Federal Taxation of the American Bar Association, has this year in its report pointed out the necessity of preserving the feeling on the part of taxpayers that the system is fairly administered and has called attention especially to the undesirability of having a different rule prevail in suits by a taxpayer to recover a tax overpaid from that which would prevail in a suit by the Government to collect the tax if it had not been paid. The report of the Committee states:

> "In a taxing system such as ours in which the continuous flow of revenue depends mainly on voluntary reports and voluntary payments by taxpayers, it is highly important to the Government that taxpayers who overpay their taxes shall promptly and easily receive refunds of any excess mistakenly collected from them. If, owing to the text of the law, or to court constructions of it or to policies pursued in administration of it, an advantage accrues to the taxpayer who puts off payment as long as he can, the working of the system will be impaired because taxpayers will realize that the system penalizes them for prompt and generous disclosure and payment. From time to time all three branches of government—the legislative, executive and judicial—have occasionally shown a tendency to proceed on narrower principles, that 'possession is nine points of the law,' and that when a taxpayer is allowed a refund of an overpayment by him, it is a mere favor to the taxpayer at the Government's expense. The fact is, that the Government revenues gain immensely whenever taxpayers can say to themselves with conviction, If my Government collects too much tax from me, it will be prompt and honest in giving me the money back, with full interest."

In another portion of its report the same Committee comments on the unfavorable aspects, from the viewpoint of public policy, of courts adopting the theory that tax actions

are equitable, rather than legal, in character and of attempting to do "rough justice" in particular cases.[6]

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[6] "While there are impressive arguments in favor of courts' seeking to 'do justice' in particular cases, so far as is possible without violating the letter of the statute, it is beginning to be clear that if courts go too far into the legislative field in adjudicating tax cases, the public interest will be injured by gradually driving more and more tax cases into the courts. The more lawsuits a taxation system produces, the worse for the Government and its revenues; administrative processes are in general better adapted to revenue collection. Uncertainty as to the final outcome produces lawsuits, and uncertainty is produced whenever the outcome of a case is made to depend on the rough justice of that particular case. Taxation legislation is peculiar, in that it contemplates as a normal thing a vast number of transactions between the Government and its citizens, and those transactions cannot proceed in an orderly administrative way unless the final result is reasonably predictable.

In older court opinions over a long period, statements are frequently found that if a statute is inequitable either to the taxpayer or to the Government, the remedy lies with Congress. This position was in part predicated on the consideration that for many years it has been the practice of Congress to give frequent attention to revenue laws, amending them when they needed it—the theory being that when a doctor is present, there is little reason for a layman to prescribe. In later years, however, the courts have occasionally shown a somewhat different tendency—to go beyond the mere 'interstices' and to soften or stiffen the law by interpretation according to their views of the case before them. This tendency has, perhaps, been more observable when the so-called 'equities' were urged in favor of the Government. Even when the Government succeeds in urging such an equitable construction, the ultimate result may be against the Government's interest, because in subsequent cases, where the positions of the Government and the contending taxpayers are reversed, the result is to confuse a statute which need not have been confused.

Tendencies to apply a rather one-sided equitable construction are, perhaps, being checked even now, as may be indicated by the more careful position taken by the courts in very recent decisions in cases where the Government sought to estop a taxpayer from relying on the true facts.

It is the view of the Committee that the substantial number of tax cases pending in courts at this time is in part due to the unpredictability as to the result in many problems affecting the revenue and that this situation is fostered in part by 'rough justice' in court decisions." Report of the Standing Committee on Federal Taxation, American Bar Association Meeting, September, 1937.

Conclusion.

For the reasons stated, this Court, in disposing of this case, should remove all doubt from the long-established rule that court actions involving taxing statutes are legal actions which should not be disposed of on equitable grounds.

Respectfully submitted,

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October 12, 1937.

SUPREME COURT OF THE UNITED STATES.

No. 6.—October Term, 1937.

D. W. McEachern, Administrator of the Estate of S. C. McEachern, Deceased, Petitioner,
vs.
J. T. Rose, Former Collector of Internal Revenue for the District of Georgia.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[November 8, 1937.]

Mr. Justice Stone delivered the opinion of the Court.

This petition for certiorari raises the question whether overpayments of income taxes for the calendar years 1929, 1930 and 1931 are so related to a tax on income which should have been but was not assessed against the taxpayer for the year 1928, as to preclude recovery of the overpayments although collection of the 1928 tax is barred by the statute of limitations.

In 1924 petitioner's decedent sold five hundred shares of the corporate stock of an insurance company for the sum of $300,000, at a net profit of $295,000 over 1918 cost. Ten per cent. of the purchase price was paid at the time of sale and the balance was to be paid in installments, aggregating annually 10% of the purchase price, in each of the nine succeeding years. As permitted by the applicable statutes (§ 202, Revenue Act of 1924, c. 234, 43 Stat. 255; §§ 202, 212, Revenue Act of 1926, c. 27, 44 Stat. 11, 23; § 44, Revenue Act of 1928, c. 852, 45 Stat. 805), decedent elected to return the profit for income taxation on the installment basis. After his death in 1928 petitioner, as his administrator, filed income tax returns in behalf of his estate for the calendar years 1928 to 1931 inclusive, showing in each year a sale of fifty shares of the stock of the insurance company at a net profit of $29,500. These returns were erroneous in point of fact and of law, as the petitioner sold no shares of the stock in any of those years and since, by reason of the

provisions of § 44 (d) of the 1928 Act[1] the capital gain included in the value of the unpaid installments at the time of decedent's death, was income taxable to decedent for the year 1928 and not in subsequent years.

By the provisions of § 44 (d), as construed by Treasury Regulations 74, Art. 355, the transmission of an installment obligation at the death of the payee capitalizes the unpaid installments of the contract and results in taxable gain to the estate of the decedent, measured by the difference between the fair market value of the obligation at the time of his death and its unrecovered cost. By § 113 of the 1928 Act the basis for computing the annual profit upon the installments paid after the decedent's death is the fair market value of the contract at the time of his death. The unpaid tax for 1928, computed as required by § 44 (d), exceeds the sum of the overpayments made in 1929, 1930 and 1931.

On the trial in the district court the collector contended that petitioner was estopped to deny that the sales of stock occurred and profit accrued as reported in his returns for the years in which refunds were claimed; and that, in any case, upon equitable principles, the petitioner was not entitled to recover the overpayments for those years, since they were less in amount than the tax which should have been assessed against him for 1928. See *Stone* v. *White*, 301 U. S. 532. The trial court overruled these contentions and gave judgment for petitioner. The Court of Appeals for the Fifth Circuit reversed, holding that petitioner was not in equity and good conscience entitled to recover the overpayments which, because of his failure to pay the 1928 tax, had resulted in no unjust enrichment of the Government. 86 F. (2d) 231. We granted certiorari, 301 U. S. —, because of the importance of the question in administration of the revenue laws.

The collector does not press here the contention that petitioner is estopped to challenge the correctness of his returns for the years

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[1] Sec. 44.

(d) *Gain or loss upon disposition of installment obligations.*—If an installment obligation is . . . distributed, transmitted, sold, or otherwise disposed of, gain or loss shall result to the extent of the difference between the basis of the obligation and . . . the fair market value of the obligation at the time of such distribution, transmission, or disposition. The basis of the obligation shall be the excess of the face value of the obligation over an amount equal to the income which would be returnable were the obligation satisfied in full.

of overpayment. The failure of the Government to assess the appropriate tax in 1928 is not shown to be attributable to the erroneous statements made in the returns for the later years, and it is not necessary for petitioner to show understatement of the income taxable in 1928 in order to show the correct amount of the different income derived from the installment contract in the years of overpayment. For, under § 113, the overpayments are established by showing that in each year the amount of income from the sale of the stock as reported exceeded the difference between the installments collected and so much of the value of the installment contract at the death as is allocable to the taxable year. But respondent insists, as the court below held, that petitioner is not equitably entitled to recover overpayments of taxes upon the profits derived from the contract in certain years because the overpayments are exceeded by a tax which he should have paid on the profits realized in an earlier year.

We may assume that, in the circumstances, equitable principles would preclude recovery in the absence of any statutory provision requiring a different result. But Congress has set limits to the extent to which courts might otherwise go in curtailing a recovery of overpayments of taxes because of the taxpayer's failure to pay other taxes which might have been but were not assessed against him. Section 607 of the 1928 Act declares that any payment of a tax after expiration of the period of limitation shall be considered an overpayment and directs that it be "credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim"; and § 609 (a) of the 1928 Act provides that "Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under section 607." These provisions preclude the Government from taking any benefit from the taxpayer's overpayment by crediting it against an unpaid tax whose collection has been barred by limitation.

It is plain that these provisions forbid credit of the overpayments of taxes for 1930 and 1931, which were made after collection of the 1928 tax was barred. If petitioner had then paid the 1928 tax there would have been an overpayment of the tax, refund of which is made mandatory by § 607. Credits against the tax of overpayments of taxes assessed for other years, if made at that

time, could not stand on any different footing under the provisions of § 609. The right of the government to credit the overpayments upon the earlier unpaid tax could arise only when the overpayments occurred; but since at that time collection of the 1928 tax was barred by limitation, and payment of it would be an overpayment, credit against it of the 1930 and 1931 overpayments was forbidden by § 609.

Different considerations apply to the 1929 overpayment. When it was made, collection of the 1928 tax was not barred and the commissioner was not then prevented by § 609 from crediting the overpayment upon the 1928 tax, although he did not do so. Section 322 of the 1928 Act,[2] continued without material change in the 1932 Act, authorizes the credit of an overpayment of any tax against any income tax "then due" from the taxpayer, and directs that any "balance shall be refunded immediately to the taxpayer." We need not inquire whether the 1928 deficiency was "due" within the meaning of this section before the tax was assessed, for in any case there could be no credit against the tax of the 1929 overpayment, before the amount of the latter was ascertained and allowed and at that time collection of the 1928 tax was barred and any credit of the overpayment against it was declared to be void by § 609.

Both § 322 and § 609 contemplate that the time of credit of an overpayment in one year against a tax for another is to be marked by some definite administrative action. This Court, upon an examination of the established practice in the Bureau of Internal Revenue, concluded that the time of allowance of a refund and the time of credit of an overpayment against a tax due, is the date of approval by the commissioner of the schedule of refunds and credits prepared by the collector, showing the amount due the taxpayer, rather than the earlier date of the certification by the commissioner to the collector, of the schedule of overassessments. See *United States* v. *Swift & Company,* 282 U. S. 468; *Girard Trust Company* v. *United States,* 270 U. S. 163. We ac-

[2] Sec. 322

(a) Authorization.—Where there has been an overpayment of any tax imposed by this title, the amount of such overpayment shall be credited against any income, war-profits, or excess-profits tax or installment thereof then due from the taxpayer, and any balance shall be refunded immediately to the taxpayer. . . .

cordingly held that approval of the schedule of refunds and credits fixes the date from which interest is allowed upon any balance refunded to the taxpayer, *Girard Trust Company* v. *United States, supra,* and the date from which the statute of limitations runs against the taxpayer's right to demand refund of a tax paid by the allowance of a credit. *United States* v. *Swift & Company, supra.*

After these decisions § 1104 of the Revenue Act of 1932, c. 209, 47 Stat. 287, changed the date which should be deemed to be the time of allowance of the credit or refund within the meaning of that and earlier revenue laws. It provided that "Where the Commissioner has (before or after the enactment of this Act) signed a schedule of overassessments in respect of any internal revenue tax imposed by this Act, or any prior revenue Act, the date on which he first signed such schedule (if after May 28, 1928) shall be considered as the date of allowance of refund or credit in respect of such tax."

The date of the claim for refund and the date of the allowance of the credit which, according to § 1104, was that of the approval by the commissioner of the schedule of overassessments, came after recovery of the 1928 tax was barred. If petitioner had then paid the tax he could have recovered it back as an overpayment under § 607; accordingly, credit against the tax of the 1929 overpayment is prohibited by § 609, as are like credits for the overpayments of 1930 and 1931.

The similar treatment accorded by the statutes to credit against an overdue tax, and to payment of it; the prohibition of credit of an overpayment of one year against a barred deficiency for another; and the requirement that payment of a barred deficiency shall be refunded, are controlling evidences of the Congressional purpose by the enactment of §§ 607 and 609 to require refund to the taxpayer of an overpayment, even though he has failed to pay taxes for other periods, whenever their collection is barred by limitation.

Sections 607 and 609 do not apply in the circumstances disclosed in *Stone* v. *White, supra.* There testamentary trustees had paid from income a tax upon it which should have been paid by the beneficiary, and it was held that they were not equitably entitled to recover the tax after the statute had barred collection from the beneficiary. The assessment of a deficiency against the trustees and the payment of it by them were not barred by limitation. Hence

§ 607 did not compel a recovery. Section 609 did not require it. The commissioner neither sought, nor did § 322, regardless of any period of limitation, permit him to credit the amount which the one taxpayer had paid against the tax which another should have paid. Equitable considerations not within the reach of the statutes denied a recovery. It was enough, in the peculiar facts of the case, that the trustees had suffered no burden and that the Government was not unjustly enriched.

Reversed.